No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, Free Speech Coalition, Free Speech Defense and Education Fund, One Nation Under God Foundation, Pass the Salt Ministries, Eberle Associates, Downsize DC Foundation, DownsizeDC.org, Restoring Liberty Action Committee, and The Transforming Word Ministries in Support of Petitioners

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P. Kurland & R. Lerner, eds., The Founders Constitution (Univ. of Chi. Press: 1987) 14, 16, 25
R. Perry & J. Cooper, eds., Sources of Our Liberties (Rev. ed., ABA Found.: 1978) 13
S. Ertelt, "58,586,256 Abortions in America Since Roe v. Wade in 1973," LifeNews.com (Jan. 14, 2016) 22

INTEREST OF THE *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund, Free Speech Defense and Education Fund, One Nation Under God Foundation, Pass the Salt Ministries, Downsize DC Foundation, and The Transforming Word Ministries are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). Free Speech Coalition and DownsizeDC.org, are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Eberle Associates is a for-profit corporation, headquartered in McLean, Virginia. Restoring Liberty Action Committee is an educational organization.

Some of these *amici* filed a brief *amicus curiae* in support of the NIFLA Petition for a Writ of Certiorari.[2]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Brief Amicus Curiae of U.S. Justice Foundation, *et al.*, National Institute of Family and Life Advocates v. Becerra (Apr. 20, 2017).

SUMMARY OF ARGUMENT

Contrary to the finding of the Ninth Circuit below, the California Reproductive FACT Act is not a constitutionally-permissible regulation of "professional speech." First, there is neither textual nor historical evidence to support the California contention that there is a First Amendment exception for "professional speech." Second, the Reproductive FACT Act is not even a regulation of "professional speech," but is a measure purportedly designed to force Crisis Pregnancy Centers to fully inform women so as to enhance the "so-called reproductive rights" of California women. Third, the Reproductive FACT Act required Notices do not constitute one-on-one "professional speech" between a licensed professional and a client, but rather constitute an advertisement to all people who come onto the premises of a California Crisis Pregnancy Center. Thus, both by design and effect, the Reproductive FACT Act requires California's Crisis Pregnancy Centers to facilitate the State's reproductive policy promoting abortion in blatant violation of the CPC's rights under the First Amendment's free marketplace of ideas.

Prior to the ratification of the First Amendment in 1791, the Constitution offered no express, textual barrier to laws coercing the people to propagate information, opinion, and ideas favored by civil rulers. In 1785, however, the people's assembly of delegates in the Commonwealth of Virginia enacted into law Thomas Jefferson's Bill for Establishing Religious Freedom. Designed to protect the people from a sinful and tyrannical government, Jefferson's bill laid down

a jurisdictional line excluding all laws that would compel the people to propagate opinions with which they disagreed. As articulated by Jefferson, "the opinions of men are not the object of civil government, nor under its jurisdiction;" rather, the realm of opinion and ideas belonged to the people "in free argument and debate." As James Madison put it nine years after the ratification of the First Amendment, "[t]he people, not the government possess the absolute sovereignty." Thus, it is for the people to correct the government, not the government to correct the people.

The Reproductive FACT Act is based upon just the opposite foundation, ordering the CPCs to conform their view that abortions are not one of the "reproductive rights" of women to the California's so-called "fully-informed" view that women must be appraised of their abortion rights. Under the First Amendment, however, California is not permitted to "weaponiz[e] the means of government against ideological foes." Greater Baltimore for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt., 2018 U.S. App. LEXIS 297 at *23-*24. Rather, the free market recognized by the First Amendment requires California to "lay down the arms of compelled speech and wield only the tools of persuasion." *Id.*

This Court's First Amendment jurisprudence prevents the government from compelling an individual to speak a message with which it disagrees — and in this case, a message which it abhors. The First Amendment jurisdictional limitation on government is so longstanding and so well-established that it is difficult to understand how the Ninth Circuit

could have upheld the validity of such a statute. The short answer appears to be that the Ninth Circuit viewed the case as an abortion rights case, not a Free Speech case, and based on that mindset, the court below was all too willing to apply a different set of legal principles to give a victory to those who support abortion. Certainly, in the past this Court has given the impression that it will adjust even well-established legal doctrines to reach a result supportive of abortion rights in numerous cases decided in the 45 years since Roe v. Wade. As Justice Scalia pointed out, this Court has demonstrated an "inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S 914, 954 (2000) (Scalia, J., dissenting).

However, in no sense is this case about abortion rights. It certainly cannot be argued, or even thought, that there is an "undue burden" being imposed on access abortion by failing to require pro-life ministries to carry a pro-abortion message. Indeed, the unfairness of such a ruling would create profound disruption for the nation. By most measures, the nation is fairly evenly split on matters of abortion. The pro-life side, however, becomes a significant majority for many specific abortion-related questions. For the large portion of the nation that is pro-life, it has been profoundly disturbing to see the federal judiciary again and again negate state laws which could be viewed as even slightly pro-life, irrespective of the outcome of elections of legislators, governors, and presidents.

These pro-abortion decisions are not truly based on the Constitution's text, or on any effort to ascertain the original meaning of the text, but are best understood as being grounded in the moral values of the federal judiciary. As such, they lose their claim of constitutional legitimacy. And, with decisions not grounded in the U.S. Constitution, the federal judiciary thereby loses its claim to the support of the American people for its rulings. Should this Court now require opponents of abortion to distribute a pro-abortion message, it will provoke Christians to determine whether they, in good conscience, could obey such a decision. It takes little imagination to understand the societal fracture that could be in the offing from such a decision.

ARGUMENT

I. THE CALIFORNIA REPRODUCTIVE FACT ACT IS NOT A CONSTITUTIONALLY PERMISSIBLE REGULATION OF "PROFESSIONAL SPEECH."

According to the Ninth Circuit, the California Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act ("Reproductive FACT Act") regulates "professional speech," and thus deserves less than full First Amendment protection. *See* NIFLA v. Harris, 839 F.3d 823, 839 (9th Cir. 2016). However, as Petitioners point out in their brief, "[t]his Court has never recognized 'professional speech' as a unique category for First Amendment analysis." Brief for Petitioner ("Pet. Br.") at 42. Nor should it. In this very case, the Ninth Circuit manipulated its inventive

"professional speech" doctrine to validate the Reproductive FACT Act even though the speech governed by the Act is not "professional speech," even as that term is defined by the Ninth Circuit itself. There is neither textual nor historical support for such a speech subclassification and, if adopted, such a doctrine would empower judges to devise their own rules governing the freedom of speech in disregard of the original principles governing the First Amendment free marketplace of ideas. *See id.* at 42-43.

A. The Commercial Speech Doctrine Cannot Be Relied on by California.

First, the record is clear that the crisis pregnancy centers in this case are nonprofit organizations offering free services, not commercial entities. Pet. Br. at 6-8. Even if it had been applicable, the "commercial speech" doctrine is deeply flawed and has been repudiated by this Court.

There have been cases where "commercial speech" has routinely been given less protection by this Court than "political speech." *See, e.g.,* Central Hudson Gas v. Public Service Comm. of New York, 447 U.S. 557 (1980). However, the answer to questions under the First Amendment is determined not by a gradation of the identity of the speaker or the kind of speech, but whether the communication at issue is one made within the marketplace of ideas outside the jurisdiction of the State or within the marketplace of goods and services inside the jurisdiction of the State. *Compare* Breard v. Alexandria, 341 U.S. 622 (1951) (door-to-door solicitation of magazine subscriptions is

protected by the First Amendment) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (street distribution of a handbill inviting visitors to submarine exhibit upon payment of a fee for admission).

Indeed, the marketplace distinction was abandoned by this Court in Bigelow v. Virginia, 421 U.S. 809 (1975), which struck down the application of a Virginia law that prohibited the advertisement of availability of legal abortion at low cost in New York as a violation of the First Amendment. In Bigelow, Justice Blackmun ruled that the commercial advertiser's "First Amendment interests coincided with the constitutional interests of the general public," as reflected in the recently decided cases of Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), also written by Justice Blackmun. Fittingly, one year after Bigelow, Justice Blackmun explained, "in *Bigelow v. Virginia* ... the notion of unprotected 'commercial speech' all but passed from the scene." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 759 (1976).

B. The Reproductive FACT Act Does Not Even Purport to Regulate "Professional Speech."

As defined by the Ninth Circuit, professional speech is "speech that occurs between professionals and their clients in the context of their professional relationship." NIFLA, 839 U.S. at 839. Stated another way, the Ninth Circuit avers that speech "can be appropriately characterized as professional when it

occurs within the confines of a professional's practice." *Id.*[3] But, the Reproductive FACT Act's purpose and scope, and indeed its very title, demonstrates that the Act is **not** limited to the "confines of a professional's practice," that is, to one-on-one speech "between a professional and a client" in relation to the "exercise of judgment on behalf of the client in light of the client's individual needs and circumstances...." *See id.* Had the California Legislature's purpose been to regulate a professional practice — although a purpose these *amici* would view as also being outside its authority — it would have applied the regulation to all licensed professionals in that field. But it did not. *See* Pet. Br. at 8.

Instead, the Reproductive FACT Act is a type of abortion rights statute, designed to ensure that Californians generally "receive accurate information about their **reproductive rights,** and to exercise those rights [un]hindered by the existence of crisis pregnancy centers (CPCs)." *Id.* at 829 (emphasis added). As the district court below pointed out, the purpose of the Act is to secure to the women of California their full scope of "reproductive rights," unhindered by the actions of the "nearly 200 CPCs:

> whose **goal** is to **interfere** with women's ability to be fully informed and exercise

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[3] Generally, the professional speech doctrine would apply to any "'speaker ... providing personalized advice in a private setting to a paying client.'" *See* Greater Baltimore for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 2018 U.S. App. LEXIS 297, *14. (4th Cir.)

> reproductive **rights**.... [NIFLA v. Harris, 2016 U.S. Dist. LEXIS 92612 at *18, n. 4 (emphasis added).]

Echoing this finding, the Ninth Circuit elaborated that the legislature found that the CPCs "'**pose** as full-service women's health clinics, **but aim** to discourage and to prevent women from seeking **abortions**' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" NIFLA, 839 F.3d at 829 (emphasis added). The purpose of the Reproductive FACT Act, then, is to block CPCs from accomplishing their goal by ridding the state of CPCs whose purpose ostensibly is to interfere with the state's pro-abortion policy. It certainly cannot be defended as a regulation of "professional speech."

C. The Reproductive FACT Act Required Notice Does Not Constitute Professional Speech.

Even if viewed as a health measure, the Reproductive FACT Act's Notice requirement kicks in "before any professional relationship has begun." Pet. Br. at 44. Thus, as the Petitioners points out in their brief, the Act is not geared to "ensure exchange of truthful information on a particular topic within an ongoing professional relationship." *Id.* Thus, the Reproductive FACT Notice requirement cannot be compared to a regulation requiring "informed consent," as the district court below claimed. *See* NIFLA, U.S. Dist. LEXIS 92612 at*23-*24. The notice is one posted for all to see, not just to ensure those seeking

individual treatment that they will be fully informed about their pregnancy concerns.

The Ninth Circuit attempted to sweep this distinction aside, pronouncing that "[b]ecause licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech." NIFLA, 839 F.3d at 840. According to this view, "**[a]ll** the speech related to the clinics' professional services that occurs within the clinics' walls, including within in the waiting room, is part of the clinics' professional practice." *Id.* (emphasis added). Presto! The information required by the State to be posted in a conspicuous place "within the clinic" becomes "professional speech," unentitled to full First Amendment protection, whereas the same forced speech outside the clinical setting presumably would be impermissible.

If the California legislature was really concerned that the State's women were in need of protection from CPC actions that "misinform" or "intimidate women from making fully-informed, time-sensitive decisions about critical health care," would the state legislators have concluded that "the most effective way" to counter the CPC threat is the posting of notices in a "conspicuous" place in a CPC waiting room? Would not the "most effective way" have been to require the doctors or nurses to impart the required notice in the context of the one-on-one personal relationship, rather than relying on the chance that an emotion-laden pregnant woman might not see, read, and understand an impersonal printed notice no matter how

conspicuous the display? But the Reproductive FACT Act is not a health licensure measure designed to ensure that individual women patients of licensed health professionals are "fully-informed [about] time-sensitive decisions about critical health care," as the Ninth Circuit found. *See id.* at 829. Rather, the Act reflects an effort by the California legislature to undermine the pro-life message by "weaponizing" the pro-choice side in the "abortion debate" with "the means of government" against their pro-life "ideological foes," seizing the CPC's waiting rooms to carry the State's message that abortion is a necessary ingredient if women are to be "fully-informed" of their "reproductive rights." *See* Greater Baltimore at *23.

D. The Reproductive FACT Act Is Designed to Put CPCs Out of Business.

Euphemistically, the State and the Ninth Circuit would have the world believe that the State is just filling in an information gap because CPCs are somehow "**unable** to enroll patients in state-sponsored programs to state the existence of these services." NIFLA at 830 (emphasis added). This Court should not permit this cynical masquerade, implying that the CPCs are falling short because of lack of resources, when in truth, CPCs are being "forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe." *See* Greater Baltimore at *23.

In truth, the Reproductive FACT Act is an exercise of raw political power by an increasingly politicized and ideologically monolithic State. Overwhelmingly

dominated by one party, the increasingly bold California legislature serves up punitive measures designed to coerce the people to conform to its collective will in flagrant disregard of CPCs' constitutional rights. The Reproductive FACT Act is an abusive and contemptible measure and should not be tolerated by this Court.

II. THE REPRODUCTIVE FACT ACT UNCONSTITUTIONALLY ABRIDGES THE FIRST AMENDMENT'S FREE MARKETPLACE OF IDEAS.

In the district court, the California Defendants contended that, because the Reproductive FACT Act did not "prohibit" CPCs "'from imparting information or disseminating opinions" [or] mentioning, discussing or advocating its pro-life viewpoint or even communicating its disagreement with the statute itself," there is no violation of the First Amendment. NIFLA, 2016 U.S. Dist. at *16. Noting that "[t]he Act does not ban speech or otherwise prohibit Plaintiffs from discussing their message with patients," but only "requires medical providers to advise their patients of various types of treatment available so patients are fully informed," the district court concluded that the Reproductive FACT Act did not violate the First Amendment rights of the CPCs. *Id.* at *22. The Ninth Circuit agreed. Indeed, the appellate panel found that "California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling" because the legislature found a problem with the very "existence of CPCs, which often present misleading information to

women about reproductive medical services," and therefore, the State-required Notices met First Amendment strictures. NIFLA, 839 F.3d at 843. But the two courts and the California Defendants are seriously mistaken here.

Under the First Amendment, it is not the job of governments to correct the people; rather, it is the job of the people to correct their governments. As James Madison observed in his Report on the Virginia Resolutions of 1800: "The people, not the government, possess the absolute sovereignty." *See* Sources of Our Liberties (R. Perry & J. Cooper, eds.) at 426 (Rev. ed., ABA Found.: 1978). Consequently, in America there is no place for government oversight of the opinions of its citizenry, such as would be the case if the government should, for example, establish an Orwellian "Ministry of Truth" to weed falsehoods out of the public debate. *See* United States v. Alvarez, 132 S.Ct. 2537, 2547 (2012). Instead, the marketplace of ideas is to be free from the coercive power of the State, as a matter of jurisdiction.

The Commonwealth of Virginia planted this jurisdictional seed in 1785 when it enacted into law Thomas Jefferson's 1779 Virginia Bill for Establishing Religious Freedom. That principle grew into the 1791 First Amendment of the United States Constitution a dozen years later. The Virginia premise rings as true today as the day it was passed by the Virginia Assembly of Delegates:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by

> temporal punishments or burthens ... tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to **propagate it by coercions** on either, as was in his Almighty power to do; that the impious **presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, **setting up their own opinions and modes of thinking as the only true and infallible**, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to **compel** a man to furnish contributions of money for the **propagation** of opinions which he **disbelieves**, is sinful and tyrannical.... [Virginia Act for Establishing Religious Freedom, reprinted in 5 The Founders Constitution at 84 (item # 44) (P. Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987) (emphasis added).]

The Reproductive FACT Act violates this principle because it has enlisted the coercive power of the State to compel CPCs to communicate the State's opinion that, to be "fully informed" of her "reproductive rights," a woman must be informed of available abortion services, and to that end, CPCs must post official notices on their premises to communicate the abortion information prescribed by the State. To put it in

Jeffersonian terms, the Reproductive FACT Act compels CPCs to "propagate" an opinion which they not only "disbelieve" but also strongly oppose. Thus, as applied to CPCs, the Reproductive FACT Act is both "sinful and tyrannical." Or, to put it in more modern terms, after review of a city ordinance comparable to the California Act, the Fourth Circuit recently has declared that:

> Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. " [Greater Baltimore at *23.]

Jefferson understood that the First Amendment jurisdictional line was not subject to existential judicial override by any "important" or even "compelling state interest" or by any level of scrutiny, "intermediate," "strict," or "rational basis." Rather, his Bill as adopted by the Virginia legislature stated:

> [T]he **opinions** of men are **not** the **object** of **civil government**, nor under its jurisdiction: That to suffer the **civil Magistrate to intrude** his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy ... because he being of course Judge of that tendency will **make his own opinions the rule of**

> **judgment**, and approve or condemn the sentiments of others only as they shall square with, or differ from his own...: And finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, unless by human interposition, disarmed of her natural weapons, **free argument and debate**; errours ceasing to be dangerous when it is permitted freely to contract them. [Jefferson, in 5 The Founders Constitution at 77 (item # 37) (emphasis added).]

In the First Amendment marketplace of ideas, the State legislature simply has no jurisdiction to compel CPCs to promote the California legislature's pro-abortion line. As Fourth Circuit Judge J. Harvie Wilkinson concluded in Greater Baltimore: the opposing sides in the abortion debate must "lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it." *Id.* at *24.

III. THIS COURT'S FIRST AMENDMENT JURISPRUDENCE SHOULD NOT BE SKEWED BY THIS COURT'S ABORTION PRECEDENTS.

A. From Toleration to Coercion.

Since this Court's January 22, 1973 landmark decision in Roe v. Wade, the state of the nation's law governing abortion has undergone revolutionary

change. Prior to the fateful date on which Roe was decided — and this brief is being filed just six days shy of 45 years after that decision — abortion was disfavored and criminalized in a majority of the states (Roe at 118). Since then, abortion has moved from just being tolerated in limited circumstances[4] to achieving the status of a super-right that may not be hindered, or even must be subsidized by the state. Although some see this evolution as "progress," it is important to remember that others see it as evidence of cultural coarseness at the very least, and perhaps a monument in the line of the moral decline and eventual social and political destruction of our nation.

In Roe, this Court at least rhetorically recognized the states' interest in protecting the unborn — what it termed "the State's important and legitimate interest in potential life...." (*id.* at 163) — a state interest that has largely been ignored in subsequent decisions. Now, this Court is confronted with the opposite assertion by a state. The Ninth Circuit's decision

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[4] Many today forget that in Roe this Court struck down the Texas statute because it criminalized abortion "without regard to pregnancy stage and without recognition of the other interests involved...." *Id.* at 164. This protection was declared not to be wrong — but too broad. Roe decided only that during the first trimester, the "abortion decision" should "be left to the medical judgment of the pregnant woman's attending physician." *Id.* However, after the first trimester, the state could regulate abortion "in ways that are reasonably related to maternal health," and significantly, after viability, the Roe Court held, states may "even proscribe, abortion except where it is necessary...." *Id.* at 164-65.

upheld California's interest not in protecting the unborn, but in impeding the work of pro-life advocates.

These *amici* urge this case be decided according to the text and historic understanding of the First Amendment. Resolved in this manner, these *amici* believe this Court can be counted on to protect the crisis pregnancy centers from this law today, as well as clarifying principles that will protect other advocates on all issues of public policy tomorrow. *See* Sections I and II, *supra*.

These *amici* believe that California can only prevail if this Court's First Amendment principles are overrun by this Court's abortion jurisprudence which decides cases in favor of abortion interests with remarkable consistency. For example, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Supreme Court affirmed Roe, but rejected Roe's "rigid" framework — as Roe protected some life. It held that a state has an interest in ensuring "that the woman's choice is informed," but that an attempt "to persuade the woman to choose childbirth over abortion," was permissible as long as these measures do not impose "an undue burden" on the woman's right. Casey at 878. But ensuing cases have undermined even that test, to favor abortion interests so that almost any impediment imposed by a state constitutes an "undue burden."

Eight years later, this Court narrowly sanctioned partial-birth abortions. The legal approach taken to strike down the Nebraska statute was extraordinary, setting on its ear a principle of statutory interpretation

that applies now in all but abortion cases. As explained by Justice Scalia in his dissent in Stenberg v. Carhart:

> To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an **abandonment of the principle** that even **ambiguous statutes** should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty — which must be chalked up to **the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue**. [Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (emphasis added).]

Indeed, the tide has shifted from removing impediments or burdens to abortion, to compelling states to facilitation access to abortions at a location near to home, at a facility of most any type, and even one paid for by taxpayers or companies against their will, as discussed *infra*. Former President Obama's Affordable Care Act mandated that those employers who provide health insurance to employees must also pay for insurance that covers abortifacients — which some in the abortion industry term contraceptives, but which actually cause the death of a conceived child.[5]

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[5] *See Amicus Curiae* Brief of U.S. Justice Foundation, *et al.*, Zubik v. Burwell (Jan. 11, 2016) at 6 n.4.

That Act led to litigation before this Court about whether pro-life employers must be complicit in funding insurance that provided abortifacients. *See* Burwell v. Hobby Lobby, 573 U.S. ___, 134 S.Ct. 2751 (2014) and Zubik v. Burwell, 578 U.S. ___, 136 S.Ct. 1557 (2016). The people of the United States charted a different course in November 2016, and President Trump expanded the exemptions for those employers claiming sincerely held religious beliefs, but last month even that modest step was enjoined by a federal district court. Pennsylvania v. Trump, 2017 U.S. Dist. LEXIS 206380 (E.D. Pa., Dec. 15, 2017).

B. From Abortion and Beyond.

Members of this Court have noted the willingness of the Court to abandon traditional legal principles to favor the abortion industry. This Court denied certiorari in a case arising from Washington state penalizing a pharmacy because it refused to provide abortifacients for religious reasons. There was evidence in that case that the state regulations were imposed on the pharmacy because of "hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State," and yet certiorari was denied. Stormans v. Wiesman, 136 S.Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari).

Almost simultaneous with this Court denying the Stormans' petition, this Court struck down a Texas law designed to protect the health and safety of women seeking abortions in that state. Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016). This

Court purported to rely on Casey's language of "undue burden," holding that a state statute that has the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion is unconstitutional. The Court instead imposed its ideas of medical safety on the nation, concluding that Texas's law did not "confer[] medical benefits sufficient to justify the burdens upon access" to abortion. Justice Thomas invoked Justice Scalia's description of what he called "the Court's troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.'" *Id.* at 2321 (citing Stenberg v. Carhart at 954 (Scalia, J., dissenting)).

Thus, in almost every case in which this Court's decision in Roe v. Wade has been applied, this Court has refused to temper its views, but rather has "doubled down" by broadening the "right to privacy" that it purported to find in the Fourteenth Amendment's concept of "personal liberty." The result has been the development of a separate and special abortion jurisprudence — where the normal principles of law and fact do not apply. Instead, in abortion cases, the Court has succumbed to the siren song of existential philosophy as articulated by autonomous man: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood v. Casey at 851 (Kennedy, Souter, and O'Connor, JJ., concurring).

In this case, the question is, therefore, whether the special abortion jurisprudence will advance even further — beyond a determination not just that

Americans must tolerate the murder of babies in their communities, or that they may not reasonably restrict the practice even for the health and safety of the mothers, or even that the babies are not even safe when partially out of the womb, but also now, for the first time, that those opposed to abortion must promote it, and that those who find it evil and sinful must become complicit in it.

C. The Divisive Consequences of the California Law.

There is no question that the American people are now deeply divided between the pro-life view and the pro-abortion view. The Supreme Court has forced those who embrace a pro-life view to live in a society where it is estimated that more than 58 million unborn babies have been killed.[6] Those who support abortion have won nearly every round in federal court, wholly negating victories for pro-life forces at the ballot box. The question now is whether the pro-abortion community with the California statute has finally gone too far.

Christians have sensed that "there always is, and must be, an 'establishment of religion' in our society, or any other. The question being fought out today is, quite simply, which religion shall be established." M. Stanton Evans, The Theme Is Freedom (Regnery Publishing: 1994) at 130. However, it is becoming more clear that the pro-abortion forces will never be

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[6] S. Ertelt, "58,586,256 Abortions in America Since Roe v. Wade in 1973," LifeNews.com (Jan. 14, 2016).

satisfied until they make the pro-life forces complicit in their behavior. If that is the outcome of this case, the consequences that will be unleashed could be astonishing.

Among those consequences will be an undermining of the legitimacy of the federal judiciary. It will compel many to conduct a re-examination of the doctrine of judicial supremacy first articulated in Cooper v. Aaron, 358 U.S. 1 (1958).

> the federal judiciary is supreme in the exposition of the law of the Constitution.... It follows that the **interpretation** of the Fourteenth Amendment enunciated by **this Court** in the *Brown* case is the **supreme law of the land**, and Art. VI of the Constitution makes it of binding effect on the States.... [Cooper at 18 (emphasis added).]

Although the Cooper Court claimed that judicial supremacy was declared by Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137 (1803), that position is demonstrably false. This Court's claim to the Judicial Supremacy of its opinions in Cooper came only 19 years after Justice Felix Frankfurter articulated the exact opposite position:

> [T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. [Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).]

Holy Writ gives insight into how Bible believers will view this Court's decision. In the fifth chapter of the Book of Acts, the rulers of Israel sought to eradicate what they perceived to be a cult that had formed around the person of Jesus Christ. Fearing that they would lose their religious and political power, these rulers of Israel were deeply offended by those Apostles of Jesus who were testifying to the great things which God had done in Jerusalem. This short story not only explains the continuing threat that can be posed to Christianity from a government, but also gives direction as to how Christians should respond to rulers that demand they violate the Word of God.

> Now when the high priest and the captain of the temple and the chief priests heard these things, they doubted of them whereunto this would grow. Then came one and told them, saying, Behold, the men whom ye put in prison are standing in the temple, and **teaching** the people. Then went the captain with the officers, and brought them without violence: for they **feared the people**, lest they should have been stoned.
>
> And when they had brought them, they set them before the council: and the high priest asked them, Saying, **Did not we straitly command you** that ye should not **teach** in this name? and, behold, **ye have filled Jerusalem with your doctrine**, and intend to bring this man's blood upon us.

> Then Peter and the other apostles answered and said, **We ought to obey God rather than men.** [Acts 5:24-29 (emphasis added).]

As cases are brought in California courts to impose $100, and then $500 civil penalties, it may be that juries, if jury trials are permitted, will refuse to find violations. Certainly, the people will lose confidence in their government, and especially in the courts. This Court would undermine its political and moral authority, as the people cease to respect and obey its decisions. It takes little imagination to understand the societal fracture that could be in the offing.

The predicate of the California law under review is that the legislature of the State of California knows the truth, and decided to compel it be spoken even by those who believe it to be a lie. Courts may be given authority to decide disputes between parties, but they have no authority to decide what is truth. As Jefferson observed, all efforts to use the power of the State to enforce "the truth" breeds hypocrisy and tyranny:

> **The opinions of men are not the object of civil government, nor under its jurisdiction**: That to suffer the civil Magistrate to **intrude** his powers into the field of opinion, and restrain the profession or propagation of principles ... is a **dangerous** fallacy.... [Jefferson, in 5 The Founders Constitution at 77 (item # 37) (emphasis added).]

CONCLUSION

For the reasons set out above, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed and the case remanded.

Respectfully submitted,

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